

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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JIMILIE D.,

Plaintiff,

v.

Civil Action No.  
5:20-CV-0881 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF STEVEN R.  
DOLSON  
126 North Salina Street, Suite 3B  
Syracuse, New York 13202

STEVEN R. DOLSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
625 JFK Building  
15 New Sudbury St  
Boston, MA 02203

HUGH DUN RAPPAPORT, ESQ.

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on October 14, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

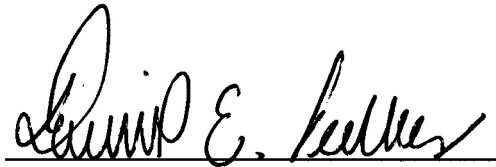
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: October 21, 2021  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
JIMILIE D.,

Plaintiff,

vs.

5:20-CV-881

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

Transcript of a **Decision** held during a  
Telephone Conference on October 14, 2021, the  
HONORABLE DAVID E. PEEBLES, United States Magistrate  
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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*Jodi L. Hibbard, RPR, CSR, CRR  
Official United States Court Reporter  
100 South Clinton Street  
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(315) 234-8547*

1 (The Court and counsel present by telephone.)

2 THE COURT: Thank you both for excellent  
3 presentations, both written and oral. I have enjoyed working  
4 with you.

5 Plaintiff commenced this action pursuant to 42  
6 United States Code Sections 405(g) and 1383(c)(3) to  
7 challenge an adverse determination by the Commissioner of  
8 Social Security finding that she was not disabled at the  
9 relevant times and therefore ineligible for the benefits  
10 sought.

11 Background is as follows: Plaintiff was born in  
12 July of 1972 and is currently 49 years of age. Plaintiff was  
13 40 years old at the alleged onset of disability on April 13,  
14 2013. Plaintiff lives in an apartment in Madison, New York  
15 with two children who, by my calculations, are approximately  
16 8 and 13 years old, respectively. They are both described as  
17 special needs children on some sort of autism spectrum.  
18 Plaintiff stands 5 foot, 5 inches in height and weighs  
19 180 pounds. Plaintiff has undeniably experienced a troubled  
20 childhood. She had an abusive mother and was in nine foster  
21 homes. Plaintiff quit school in 10th grade, was in special  
22 education classes. She did achieve a GED in 1990. She is  
23 also a licensed certificated CNA and home health aide. She  
24 had one semester of college but failed in that experience.  
25 Plaintiff stopped working in April of 2013. Prior work

1 included as an assembly line worker in a wire factory, a  
2 college food services worker at Colgate University, a  
3 restaurant worker, a home care aide, and an assisted living  
4 facility aide. Plaintiff testified at 69 to 70 of the  
5 administrative transcript to being fired from several jobs.

6 Physically, plaintiff suffers from lumbar and  
7 cervical spine degenerative disk disease, carpal tunnel  
8 syndrome for which she has not had release surgery,  
9 fibromyalgia, psoriatic arthritis, asthma, headaches,  
10 obesity, and a thyroid condition. Plaintiff has not  
11 undergone any surgery. She does receive injections to  
12 relieve her pain.

13 Mentally, plaintiff suffers from attention deficit  
14 and hyperactivity disorder, or ADHD, an intellectual  
15 disorder, depression, post-traumatic stress disorder,  
16 borderline personality disorder. She receives counseling  
17 every other week and sees a psychiatrist monthly. Plaintiff  
18 has been treated from various sources including Bassett  
19 Healthcare, Adirondack Pain Management, Oneida Family  
20 Counseling Services, ADHD and Autism Psychological Services,  
21 and Madison County Department of Health.

22 Plaintiff is able to bathe, dress, shower, cook,  
23 clean, do laundry, shop, care for her two autistic children,  
24 attend counseling in group sessions, she watches television,  
25 listens to the radio, goes out and is on social media.

1 In terms of background, plaintiff applied for Title  
2 II and Title XVI benefits in February of 2010. That  
3 application was denied after a hearing and the Social  
4 Security Administration Appeals Council denied review on  
5 March 4, 2013. Plaintiff again applied for Title II and  
6 Title XVI benefits on July 31, 2015, alleging an onset date  
7 of April 13, 2013, and originally claiming depression, PTSD,  
8 dysthymic disorder, and bulging disks as a basis, as well as  
9 anxiety, ADHD, and arthritis, later adding fibromyalgia and  
10 an intellectual disorder.

11 A hearing was conducted on July 11, 2017 by  
12 Administrative Law Judge David Pang, who issued an  
13 unfavorable decision on August 14, 2017. The matter was  
14 remanded by the Social Security Administration Appeals  
15 Council on August 14, 2018 for further proceedings to focus  
16 on plaintiff's mental limitation.

17 A hearing was conducted on April 24th, 2019 by a  
18 duly assigned administrative law judge, Kenneth Theurer. ALJ  
19 Theurer issued an unfavorable decision on May 28, 2019 which  
20 became a final determination of the agency on July 1, 2020  
21 when the Social Security Appeals Council denied plaintiff's  
22 application for review. This action was commenced on  
23 August 5, 2020 and was timely.

24 In his decision, ALJ Theurer applied the familiar  
25 five-step test for determining disability. He first noted

1       that plaintiff was last insured on June 30, 2014.

2                       (Interruption by the court reporter and pause  
3                       in proceedings.)

4               THE COURT: We are back on the record. In his  
5       decision, ALJ Theurer applied the familiar five-step test for  
6       determining disability. He first noted that plaintiff was  
7       last insured on June 30, 2014.

8               At step one, the ALJ concluded plaintiff did not  
9       engage in substantial gainful activity since April 13, 2013.

10              At step two, he concluded that plaintiff does  
11       suffer from physical and mental impairments that impose more  
12       than minimal limitations on her ability to perform basic work  
13       activities, including degenerative disk disease of the lumbar  
14       spine, degenerative disk disease of the cervical spine,  
15       carpal tunnel, fibromyalgia, psoriatic arthritis, asthma,  
16       intellectual disorder, attention deficit hyperactivity  
17       disorder, depression, post-traumatic stress disorder,  
18       borderline personality, and headaches.

19              At step three, the ALJ concluded plaintiff's  
20       conditions do not meet or medically equal any of the listed  
21       presumptively disabling conditions set forth in the  
22       regulations, specifically considering Listings 1.04, 3.03,  
23       14.09, Social Security Ruling 12-2p regarding fibromyalgia,  
24       and the 12.02, et cetera series governing the mental  
25       impairments.



1           The ALJ next concluded that plaintiff retains the  
2       residual functional capacity, or RFC, to perform sedentary  
3       work with additional limitations that address both physical  
4       and mental impairments.

5           At step four, ALJ Theurer concluded that plaintiff  
6       is incapable of performing her past relevant work as a home  
7       health aide and a cafeteria food service worker, a strander  
8       operator, and a restaurant aide.

9           At step five, he noted first that if plaintiff were  
10      capable of performing a full range of sedentary work, a  
11      finding of no disability would be directed by the  
12      Medical-Vocational Guidelines and specifically Grid Rule  
13      201.28. Based on the testimony of a vocational expert who  
14      considered a hypothetical that mirrored the residual  
15      functional capacity finding, ALJ Theurer found that plaintiff  
16      could perform work available in the national economy and  
17      cited as representative jobs addresser, document preparer,  
18      and cutter and paster/press clippings, and therefore  
19      concluded plaintiff was not disabled at the relevant times.

20           As you full well know, the court's function in this  
21      case is limited to determining whether correct legal  
22      principles were applied and the result is supported by  
23      substantial evidence, defined as such relevant evidence as a  
24      reasonable mind would find sufficient to support a fact.

25           Plaintiff's contentions in this case are limited.

1 She challenges the administrative law judge's failure to  
2 consider opinions in the record from Dr. Harry Kissi and  
3 Nurse Practitioners Grace Digman, Svetlania Bykovich, and  
4 Maureen Gallagher. The focus of the claimed error is on  
5 plaintiff's physical capacity.

6 Of course the first requirement, or pivotal to the  
7 finding of disability or no disability is determining  
8 plaintiff's residual functional capacity, or RFC, which  
9 represents a finding of the range of tasks a plaintiff is  
10 capable of performing notwithstanding her impairments.  
11 Ordinarily, an RFC represents a claimant's maximum ability to  
12 perform sustained work activities in an ordinary setting on a  
13 regular and continuing basis, meaning eight hours a day for  
14 five days a week or an equivalent schedule. An RFC  
15 determination is informed by consideration of all of the  
16 relevant medical and other evidence and of course, to pass  
17 muster, must be supported by substantial evidence. Because  
18 the applications in this case were filed prior to March of  
19 2017, the former regulations control the weight to be given  
20 to medical opinions. I will cite the regulations that govern  
21 the Title II application. There are parallel and virtually  
22 identical regulations that govern the Title XVI claim as  
23 well. Evaluation of medical opinions is addressed in 20  
24 C.F.R. Section 404.1527. Subsection (a)(1) of that  
25 regulation defines a medical opinion as the statement from an

1 acceptable medical source that reflect judgments about the  
2 nature and severity of a claimant's impairments, and I'm  
3 paraphrasing. Of course, acceptable medical sources do not  
4 include nurse practitioners but do include physicians.

5 The weight to be given to a medical opinion is  
6 governed by Section 404.1527(c), which addresses factors to  
7 be considered in weighing a medical opinion. The only  
8 opinion that satisfies that definition that was not mentioned  
9 was that from Dr. Harry Kissi, and it appears at page 696 of  
10 the administrative transcript. It was not mentioned, and as  
11 the Commissioner concedes, that clearly was error. It was  
12 not mentioned by ALJ Theurer in his opinion. However, as  
13 plaintiff concedes, the medical opinion of Dr. Kissi does not  
14 undermine the resulting residual functional capacity finding  
15 and therefore any error in that regard is harmless.

16 The others include opinions from Nurse Practitioner  
17 Grace Digman from March 17, 2016 that indicates plaintiff is  
18 very limited in standing, lifting and carrying, pushing,  
19 pulling, and bending. And in the form which is at 673 of the  
20 administrative transcript, part of Exhibit 21F, it indicates  
21 back, neck pain, limited in pushing, pulling, lifting,  
22 standing, walking for extended periods of time.

23 There is also an opinion from Maureen Gallagher, a  
24 nurse practitioner, from November 7, 2015 at 675. Again,  
25 very limited in pushing -- these are very difficult to

1 read -- lifting and carrying, sitting, and pushing, pulling,  
2 and bending. And that one states back, neck pain, no  
3 pushing, pulling, lifting, or carrying.

4 There is also an opinion from Nurse Practitioner  
5 Gallagher from May 29, 2015 approximately, it's not dated but  
6 that is indicated as the last date of examination. On that  
7 form which appears at 677, indicating plaintiff is very  
8 limited in standing, lifting and carrying, pushing, pulling,  
9 bending, and it says back/neck pain, no pushing, pulling,  
10 lifting, or carrying.

11 There is a, an opinion from Nurse Practitioner  
12 Svetlania Bykovich, doesn't appear to be dated, and it  
13 indicates lift -- limited lifting, pushing, and pulling.

14 There is further opinion from Nurse Practitioner  
15 Gallagher from December of 2013 at page 700 and indicates  
16 plaintiff is very limited in standing, sitting, lifting,  
17 carrying, pushing, pulling, bending, and it says back pain  
18 which increases with pushing, pulling, lifting, and carrying.  
19 She cannot sit or stand for more than 15 minutes I believe is  
20 what it says, it is somewhat illegible.

21 And lastly, there is an opinion from Nurse  
22 Practitioner Gallagher on -- it is again undated but  
23 indicates that the last examination occurred on May 8, 2013.  
24 This appears at page 712. Shows that plaintiff is very  
25 limited in standing and lifting and carrying, and it says no

1 standing or sitting for more than one half hour at a time, no  
2 lifting, pushing, or pulling, all of these activities  
3 aggravate sciatic and cervical neck.

4 The only mention of Nurse Practitioner Gallagher  
5 appears at page 19. It is part of the step three analysis by  
6 the administrative law judge and clearly focuses on the  
7 mental component which is really not the thrust of Nurse  
8 Practitioner Gallagher's several opinions. Nurse  
9 Practitioner Digman and Nurse Practitioner Bykovich are not  
10 mentioned at all.

11 These are not acceptable medical sources. However,  
12 consideration of their opinions is governed by Section  
13 404.1527(f), which requires that they be considered, using  
14 the factors articulated in subdivision (c) of that  
15 regulation. And specifically, that section goes on to  
16 provide as follows: The adjudicator generally should explain  
17 the weight given to opinions from these sources, or otherwise  
18 ensure that the discussion of the evidence in the  
19 determination or decision allows a claimant or subsequent  
20 reviewer to follow the adjudicator's reasoning when such  
21 opinions may have an effect on the outcome of the case.  
22 These are extremely important opinions, particularly since it  
23 appears that Nurse Practitioner Gallagher has treated the  
24 plaintiff since November 27, 2012. There's evidence in the  
25 record of several examinations. I believe that there was a

1 duty on the part of the administrative law judge to mention  
2 those opinions and give an indication that they were  
3 considered. *Kentile v. Colvin*, 2014 WL 3534905 from the  
4 Northern District of New York, July 17, 2014. They should  
5 have been reviewed and Section 404.1527(f) should have been  
6 but was not followed. The failure to discuss and explain  
7 those opinions is error. *Javon W. v. Commissioner of Social*  
8 *Security*, 2019 WL 1208140, from the Northern District of  
9 New York, March 13, 2019, and *Saxon v. Astrue*, 781 F.Supp.2d  
10 92 from the Northern District of New York, 2011.

11 The question is, is there prejudice? It is true  
12 that in the first instance it is for the administrative law  
13 judge to weigh conflicting opinions in the record. *Veino v.*  
14 *Barnhart*, 312 F.3d 578, from the Second Circuit, 2002. I am  
15 unable to say that the error was harmless. The opinions of  
16 the nurse practitioners and particularly Nurse Practitioner  
17 Gallagher are more restrictive in several areas than the  
18 residual functional capacity, including the sit-stand  
19 limitations. The administrative law judge failed in his duty  
20 to consider those opinions and articulate what weight, if  
21 any, was given to them and why.

22 So I will grant judgment on the pleadings to the  
23 plaintiff and remand the matter for further consideration  
24 without a directed finding of disability. I don't believe  
25 there is such persuasive proof of disability in the record as

1 to warrant a directed finding in that regard.

2 Thank you both for excellent presentations, I hope  
3 you have a good rest of the day.

4 MR. RAPPAPORT: Thank you, your Honor.

5 MR. DOLSON: Thank you, Judge.

6 (Proceedings Adjourned, 11:38 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
Official Realtime Court Reporter, in and for the  
United States District Court for the Northern  
District of New York, DO HEREBY CERTIFY that  
pursuant to Section 753, Title 28, United States  
Code, that the foregoing is a true and correct  
transcript of the stenographically reported  
proceedings held in the above-entitled matter and  
that the transcript page format is in conformance  
with the regulations of the Judicial Conference of  
the United States.

Dated this 14th day of October, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter